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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ENRIQUE RESENDIZ, Defendant and Appellant.	H032537 (Santa Cruz County Super. Ct. No. F12957)

Defendant Jose Enrique Resendiz appeals from a judgment of conviction entered after a jury found him guilty of first degree murder with the special circumstance that the murder was committed while defendant was an active participant in a criminal street gang and that the murder was carried out to further the gang's activities. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(22).)[1] The jury also found true the allegation that defendant committed the murder for the benefit of a criminal street gang. (Former § 186.22, subd. (b)(1).) In addition, the jury found that defendant personally used a firearm, intentionally discharged a firearm, and intentionally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)). The trial court sentenced defendant to life imprisonment without the possibility of parole consecutive to a term of 25 years to life. On appeal, defendant raises issues relating to the cross-examination of a witness, the admissibility of evidence, the

[1] All further statutory references are to the Penal Code unless otherwise stated.

sufficiency of the evidence, prosecutorial misconduct, and jury instructions. We conclude the trial court erred in instructing the jury regarding an element of the special circumstance (§ 190.2, subd. (a)(22)) and the gang enhancement (former § 186.22, subd. (b)(1)) findings. Accordingly, the judgment is reversed and the matter is remanded for retrial of these findings. If the prosecutor elects not to retry the matter, the trial court shall resentence defendant.

I. Statement of Facts

A. The Murder

Defendant was a member of City Hall Watsonville (CHW), a Norteno gang. He frequently wore red and was shown in various photographs flashing CHW and Norteno gang signs. Defendant also associated with other CHW members. During the week, defendant lived with his wife and her family in Redwood City. On weekends, he stayed at his family's home at 422 Second Street in Watsonville.[2]

At approximately 5:15 p.m. on February 19, 2006, Arturo "Cura" Cardenas was murdered on Locust Street in Watsonville. Cardenas was wearing a blue shirt and had the letters "S-U-R" tattooed on the back of his head. "SUR" is used as an abbreviation for "Sureno." Cardenas was involved with the Poor Side gang, a Sureno gang.

Sandra Diaz, who was Cardenas's girlfriend, spent most of the day with him on February 19, 2006.[3] Late in the afternoon, she was driving Cardenas's car while Cardenas was in the passenger seat and her two-year-old child was in the back seat. When they were on Locust Street, Cardenas saw his friend Alejandro "Pepe" Hernandez and told Diaz to stop. Before Cardenas left the car, he mentioned that he saw four "chapetes," which is an insulting term for Nortenos. Diaz then saw four men walking

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[2] Defendant's car was registered at the Watsonville address between January 12, 2006 and January 12, 2007.

[3] When Diaz testified, she was wearing a wig and glasses as a disguise.

towards Cardenas. One of the men, who was wearing a red shirt under his black sweater, walked across the street. He was hiding his hands under his sweater. Diaz told Cardenas, who appeared scared, to get in the car. As Cardenas was about to open the car door, the man came closer. Cardenas asked, "What's up," and the man pulled out a gun. Cardenas told him to calm down, turned around, and started running away from the car. The man with the gun ran after him. Diaz left and did not see the shooting. Diaz identified defendant as the man with the gun. She was "[o]ne hundred" percent sure of her identification.[4]

Alejandro Hernandez was Cardenas's friend and a member of the Poor Side gang. Shortly after 5:00 p.m. on February 19, 2006, he was sitting in his car on Locust Street. He had just smoked $10 worth of methamphetamine when he saw Cardenas. Cardenas walked over to his car and told him to be careful because there were Nortenos in the area. When Alejandro Hernandez looked in his rearview mirror, he saw several men, who were approaching with their hands in their pockets. After Diaz called to Cardenas, he walked back towards his car. However, another man, who was wearing a red shirt under a black sweater with a hood, approached. He and Cardenas made some movements as if they

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[4] On February 19, 2006, Officer Jorge Zamora showed Diaz several photo lineups. She wrote, "I think he's the one that had the gun" in relation to number three of exhibits 16 and 17A. According to Officer Zamora, this was a photo of Olegario Gonzalez, who looks similar to defendant. Diaz did not pick a photo from exhibits 16A and 17B. Officer Zamora testified that number one in this lineup was a very old photo of defendant. Regarding number three of exhibits 16C and 17D, she wrote, "He looks like the guy but not sure."

On February 21, 2006, Officer Zamora showed Diaz another photo lineup. She circled number two of exhibits 16D and 17E, which was a current photo of defendant. She told the officer, "Well, he looks like the guy. But, I mean, I am not going to say if he is the guy." However, at trial she explained that when she "told [the officer] that, [she] was very sure it was him." She further testified that she later asked the officer if she was wrong, and he responded, "No, that it was him." According to Officer Zamora, Diaz said, "That's him," when she identified defendant's photo. He denied telling her that she identified "the right one." Diaz also told another officer that she was "a hundred percent sure" of her identification of defendant.

were "going to get into it." The man then removed a gun from under his shirt and shot Cardenas as Diaz drove away. Alejandro Hernandez was about to drive toward Cardenas when one of the other men reached in his pants. This gesture scared him and he drove away. Alejandro Hernandez described the shooter as skinny, and "[l]ike a head" shorter than 5 feet 9 inches. He selected defendant from a photo lineup shortly after the murder and identified defendant as the shooter at trial.[5]

Maria Guadalupe Ortega, Cardenas's cousin, was at her parents' house at 220 Second Street on the night of the shooting when she heard three gunshots. Her cousin Jose, who had been outside, told her that he had seen some men with guns. She also testified that there was a party at her parents' house a year and a half or two years earlier. At that time, Cardenas and other family members were present. Some neighbors, including Ernesto "Miko" Perez, Luis Hernandez, and defendant, arrived and were trying to create problems.[6] Defendant called Cardenas "scrapa," a derogatory term for a Sureno, and threatened to beat and kill him. Defendant said, "I don't want that fucking little scrap cousin here on this street because if they come here, here on this street, they won't get out in good shape." He also told Cardenas, "We're going to beat the fuck out of you, you fucking scrap," and "I know that you have relatives that are Surenos, and I'll kill them all." After Ortega threatened to call the police, defendant, Perez, and Luis Hernandez left. Several years earlier, these three men also beat one of Ortega's friends.

Other individuals testified about their observations at the time of the murder. Jorge Lopez lived at 236 Locust Street. He heard two to four gunshots at about 5:15 p.m. in February 2006. When he saw a body lying on the lawn, he called 911. Rosa Rivas parked her car on Second Street at about 5:00 p.m., and saw three or four men exiting the

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[5] When Alejandro Hernandez selected defendant's photo, he stated: "This is the thin male, walking alone, who had the gun."

[6] According to Ortega, defendant, whom she knew as "Twinkie," lived in the brown house at 422 Second Street while Luis Hernandez lived in the blue house at 311 Second Street. Ortega also testified that she was "scared" to testify at trial.

blue house. She also saw two men, whom she identified as defendant and Perez, walking from the driveway.

Micaela Luna was having an affair with defendant in 2006. On February 18, 2006, Luna picked up defendant at his family's house in Watsonville and drove him to her house in Castroville where defendant spent the night. The next day, Luna drove defendant back to Watsonville and left him at Luis Hernandez's house at about 5:10 p.m. Defendant was wearing a black sweater. After Luna had driven a few blocks away, defendant phoned her and asked her to return because he had left something in her car. Luna returned to Luis Hernandez's house, but defendant was not there. She left, and defendant called her again. He asked her to pick him up, and his voice was "in a hurry, just like hurry up." Defendant then called her a third time and told her to pull into the driveway. When defendant exited the house, he was wearing a white T-shirt. Luna and defendant returned to her home in Castroville where defendant spent the night. The following morning, she dropped him off at a gas station where his brother worked.

Juan Pablo Hernandez's sister is defendant's wife.[7] On February 20, 2006, defendant returned to his house in Redwood City where he lived with his wife, their two children, Hernandez, and other family members. The previous evening, Hernandez had learned that someone had been killed close to his grandmother's house at 311 Second Street. Hernandez asked defendant if he knew anything about it. Defendant initially said that he did not know anything. However, defendant then stated that "there was a confrontation at the corner" during which defendant asked "an old cat" or gang member if he was a "scrap." The man did not respond, but continued walking toward defendant and pulled out a knife. Defendant told Hernandez that he shot the man four or five times and then walked to his house at 422 Second Street.

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[7] There is no relationship between Juan Pablo Hernandez and Alejandro Hernandez. Luis Hernandez is Juan Pablo Hernandez's uncle. We will refer to Juan Pablo Hernandez as Hernandez.

On February 21, defendant called Hernandez from Los Angeles and asked him to tell the police that he was in Redwood City that weekend. He also asked him to tell his mother and sister to make the same statement to the police.

Officer Michael McKinley testified that he and another officer transported defendant from Redwood City to Watsonville on February 24, 2006. Defendant first told Officer McKinley that his girlfriend Miki Leon lived in Castroville, but then claimed that she lived in Salinas. According to defendant, she was his second alibi, but defendant did not want her involved. Officer McKinley obtained her phone number from defendant, and learned that her full name was Micaela Leon Luna. While Officer McKinley was talking to Luna, defendant shouted, "Don't talk to him." Luna told him that she lived in Castroville.

On the same day, Officer Zamora interviewed defendant. Defendant told the officer that he went to Watsonville on February 17 and spent some time with Luis Hernandez until 10:00 or 11:00 p.m. He stayed the night at his parents' house on Second Street in Watsonville and returned to Redwood City the following morning. He then spent Saturday and Sunday in Redwood City. Defendant first stated that he had never held a gun. He then stated that his father had a gun. However, he later admitted that he was the man in a photograph holding a .45 caliber gun.

Defendant provided another version of his whereabouts when the shooting occurred. He stated that he was with his girlfriend on February 19, but did not want his family to learn that he was having an affair. Later, he admitted that he was on Second Street on February 19, but denied that he was the shooter. Defendant also stated that Luis Hernandez was a member of CHW and that many of his friends were in this gang.

Luna was interviewed by the police on February 24, 2006. She initially told the officer that defendant was with her on February 19 in Castroville. However, after she learned that defendant might have been involved in a murder, she stated that she drove

defendant back to Watsonville. A few days later, defendant called her from jail and asked her to say that he was with her.

Defendant called his sister from jail and told her "that girl" "is the only one that can help" him because he was with her. Defendant also asked his wife to speak to her. On another occasion, defendant asked other women to go talk to her and tell her that the police were "just trying to scare" her.

Maria Rosario Hernandez, defendant's mother-in-law, testified that she held a barbecue at her house in Redwood City on February 19, 2006. She saw defendant that morning, but he did not attend the barbecue. Later that week, her son asked her to tell the police that defendant was at the barbecue.

The police did not recover the murder weapon, which was a Colt .45 caliber automatic gun.[8] The shooter fired seven shots and hit Cardenas five times. A knife was found next to Cardenas's body.

The police conducted searches of defendant's residences in Watsonville and Redwood City. They found a CD case with "City Hall Watson" written in red under defendant's bed, white shoes with red trim, and a notebook with "City Hall Locos Nortenos" and "Nortenos" on it. "CHW," "bandit," "CML," "Watsonville via Norteno," "CHW 14," "14," and "XIV" were written on various structures in the backyard and front porch of the Watsonville residence. The police also found ammunition and weapons at the same residence. They found two .45 caliber bullets in a flower pot in one of the bedrooms, a box of .45 caliber bullets in another bedroom, a holster that would fit a "large frame" firearm, and .9 millimeter semiautomatic gun, or Tec-9, in a storage shed in the backyard. They also found six .9 millimeter bullets in defendant's vehicle.

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[8] A photograph of defendant in which he was holding a gun that matched the description of the murder weapon was introduced into evidence.

B. Gang Evidence

Officer Jesus Cortez, an expert in criminal street gangs, testified that there are three gangs in downtown Watsonville. There is one Norteno gang, CHW, and two Sureno gangs, Poor Side Watsonville and Mexican Side Locos. Nortenos are associated with red, the number 14, and the letter N. Surenos are associated with blue, the number 13, and the letter M. Officer Cortez also discussed the connection of weapons and gangs: "[W]eapons are commonly used by gang members. If you are in possession of a weapon or use a weapon and commit a very violent crime, again, that will bolster the individual[']s reputation. It will show that you are willing to go all the way, or commit a violent crime using that weapon for the gang."

According to Officer Cortez, CHW was a street gang whose "[p]rimary activity would be something as simple as a felony vandalism, just tagging on the walls, tagging CHW to a battery, assault with a deadly weapon, carjacking, a robbery, as serious as a homicide." In his opinion, "City Hall gang members either individually or collectively, engage in criminal or violent crimes. They continuously wear red clothing. They are continuously photographed. They . . . carry weapons. And on several occasions some of these individuals are in possession of articles, newspaper clippings that have indicated or promoted gang violence." He based his opinion that City Hall engaged in a pattern of criminal activity "on some of [his] personal investigations, some the incidents that [he had] personally seen involving Mr. Resendiz committing a robbery. Other contacts that [he had] made with other individuals being involved in criminal activity."

Officer Cortez believed that defendant was an active participant in the CHW gang. He testified: "First of all, start out with on two separate occasions he's been stopped or contacted with ammunition, nine millimeter bullets, in his car. He's been contacted with knives in his possession. He displays gang signs unique to City Hall Watsonville. He's been contacted with other Norteno gang members. And he has committed crime with other Nortenos or City Hall gang members. [¶] He continuously wears clothing. He's

been photographed on several occasions holding a gun. And I think I mentioned he's been photographed with several City Hall gang members, or other Norteno gang members."

Officer Cortez concluded that Johnny Martinez, Sergio Salis, Perez, Dennis Moreno, Luis Hernandez, Jacinto Torres, Richard Bettencourt, and Olegario Gonzalez were CHW members. Defendant, Martinez, Salis, Perez, Moreno, and Luis Hernandez constituted a core group of individuals who would congregate at either Luis Hernandez's residence at 311 Second Street or defendant's residence at 422 Second Street. Based on his experience, Officer Cortez stated that witnesses or victims are less likely to cooperate in gang cases.

Officer Cortez also recounted several incidents involving CHW members to support his conclusions regarding CHW's primary activities, its pattern of criminal activity, the active participation of defendant and his associates in CHW. He testified that defendant attacked Gustavo Ramirez with a knife on August 22, 2002. Officer Cortez had no personal knowledge of this incident, and the District Attorney's Office declined to file charges against defendant. On August 23, 2003, defendant's neighbor reported that defendant was involved in a fight with weapons near his Watsonville house. When an officer attempted to conduct a pat down search of defendant, defendant said, "You can't fuckin' search me." Defendant was convicted of misdemeanor resisting arrest. In October 2003, the police stopped Jacinto Torres's car. Gonzalez and defendant were also detained. A shotgun was found in the car. A few days later, the police stopped defendant for a traffic violation, and found six .9 millimeter bullets in his vehicle. The following month, the police stopped a vehicle in which defendant was a passenger. Defendant admitted that he was a "Northerner." On November 14, 2003, Bettencourt and another CHW member stole money from a man at knifepoint. Bettencourt was convicted of robbery and the other perpetrator fled the country. On November 22, 2003, the police saw Gonzalez steal property from a man at knifepoint. As he fled to a truck driven by

defendant, Gonzalez yelled, "Puro Norte." After they were detained, police found a gun and a knife. Gonzalez was convicted of felony grand theft, Torres was convicted of possession of a firearm by a felon, and defendant was convicted of misdemeanor accessory after the fact. In March 2004, defendant, Luis Hernandez, and another beat a Sureno gang member. No charges were brought against defendant. In December 2005, defendant, Luis Hernandez, and others were implicated in a fight involving guns and knives. In September 2007, defendant was listed as a CHW member on a "kite," which was discovered in Bettencourt's cell. A "kite" is a document with very small writing, which jail inmates use while incarcerated.

C. Defense Case

Kelly Luker, a defense investigator, testified regarding the length of time it would have taken Luna to drive defendant to and from Watsonville.

Officer McKinley testified that he interviewed Luna after the murder. At that time, she stated that she received two phone calls after the murder.

II. Discussion

A. Restriction of Cross-examination of Hernandez

Defendant contends that the trial court erred in restricting cross-examination of Hernandez. He asserts that he was entitled to cross-examine this witness "in an effort to show that he was not credible in his trial testimony (a) because he changed his story, and, indeed, changed his story three times due to police threats and pressure, (b) because he changed his story only because of those threats, and (c) because he falsely testified at trial to that changed story in order to avoid prosecution as an aider and abettor or accessory."

1. Background

A few days after the homicide, defendant and Hernandez were arrested in Redwood City. Detectives Monica Herrera, Zamora, McKinley, and Jimmy Johnson

interviewed Hernandez for approximately eight hours. Detective Herrera conducted most of the interview during which the police repeatedly offered Hernandez food and soda or water.

Hernandez initially stated that defendant was in Redwood City on the day of the murder, and provided an account of his activities that weekend. Detective Herrera told Hernandez that if he was lying for defendant, he was going "down for a homicide," and his contact with his family would be extremely limited. The police noted that he provided details of his activities on February 17 and 18, but was very vague about February 19, and they repeatedly stated that he was either a suspect or a witness. At this point, Hernandez stated that he "didn't even know he had done it," admitted that defendant was not in Redwood City, but claimed he did not know where defendant was on February 19. Hernandez also stated that "[h]e never told me he killed nobody." According to Hernandez, defendant went to Watsonville on February 17 and returned to Redwood City on February 20. On the night of February 19, Hernandez received a call from his sister, defendant's wife, who was in Mexico. She sounded scared and nervous, and wanted to know when he had last seen defendant. She told him that "they killed somebody in Watsonville" near their grandparents' house, but she did not know the victim's identity. Hernandez was unable to get information about the shooting from the Internet.

The police told Hernandez that additional witnesses had identified defendant as the shooter and they threatened to charge him as an accessory. Hernandez stated that he provided defendant with an alibi, because defendant said police were looking for him. According to Hernandez, defendant "never told [him] he had done it." After the police urged him to tell the truth, Hernandez admitted that defendant told him that he was there. Hernandez stated that defendant didn't tell him that he had a gun. However, when Hernandez was asked what defendant did with the gun, Hernandez said he "[t]ossed it" and agreed that "it fuckin' boomed when he shot the gun." Hernandez then repeated that defendant did not tell him that he did it.

After Detective Herrera focused on the need for Hernandez to make a choice between the various members of his family, and asked him what his mother would do in his situation, Hernandez expressed concern about retaliation. Detective Herrera explained the various possibilities for protection and refused his request to talk to his mother. Detective Johnson then threatened Hernandez with prosecution and provided a graphic description of sexual assault in prison. Detective Johnson also stated that Hernandez's mother did not raise him to be a liar, and Hernandez began recounting his conversation with defendant. Defendant told him that he shot the victim four or five times.

At the end of the interview, Hernandez told the officers that their treatment of him was "cool" and that they didn't disrespect him. He felt that they tricked him "a little" because they repeated the questions a lot. Hernandez also gave his opinion that "[m]en don't know how to lie." When the officers asked if there was something that they could have done better, Hernandez replied that they were "cool," but he thought that the room was "boring" and he was a little cold. Hernandez also believed that he would need to watch his back his whole life and was worried about someone coming after him. Though he wanted to know more about the witness protection program, he felt safe going home "[f]or a while."

Prior to trial, defendant moved to exclude Hernandez's testimony on the ground that it had been coerced, or alternatively, to play the videotape of his interview by the police. The trial court denied the motion on the ground that the police tactics were not coercive. However, the trial court also noted that defendant would have the "opportunity to cross-examine and can cross-examine about the things that were said or done during the interview."

The prosecutor argued that the trial court should preclude cross-examination as to what was said during the interview because it was not relevant and its probative value was outweighed by its prejudicial effect. Defense counsel argued that the police

interview was coercive, and he also noted that he sought to cross-examine the witness. The trial court stated: "You are entitled to cross-examine the witness about whether the testimony is coerced. I am not going to make any rulings about your cross-examination in advance. I am not going to make you submit questions in advance because cross-examination is, as Justice Scalia will tell you, your major tool of defense. But it's very unlikely that they are going to get to play any part or place in front of the jury any part of the interrogation preceding because it's not relevant to whether that coercion still exists unless you can create some theory that you think is viable as to why that might exist such as -- I am not going to suggest any -- but the issue is current day coercion not coercion 20 months ago. [¶] . . . [¶] . . . But right now I am not going to make a pre-trial ruling that limits his cross-examination because we have to wait and see how he cross-examines and whether it's subject to limitation as the questions are asked." The trial court then granted the prosecutor's request for an Evidence Code section 402 hearing regarding the voluntariness of Hernandez's testimony.

Prior to Hernandez's trial testimony, the trial court offered to conduct an Evidence Code section 402 hearing. Defense counsel again sought to exclude Hernandez's testimony on the ground that the police used coercive tactics during the interview. The prosecutor disputed that the interview was coercive. After defense counsel declined to call any witnesses, the trial court found that there was insufficient evidence that Hernandez's statements were the product of police coercion, and thus defendant's due process rights had not been violated. The trial court also concluded that defendant would not be permitted to cross-examine Hernandez regarding police statements that were made during the interview unless defendant could make an "offer of proof that anything that happened that day is still -- has an operational effect on Mr. Hernandez's testimony today."

2. Legal Analysis

A criminal defendant has a federal constitutional right to confront witnesses against him or her. (U.S. Const., 6th Amend.; *Pointer v. Texas* (1965) 380 U.S. 400, 406-407.) Undue restrictions on a criminal defendant's cross-examination of a prosecution witness may amount to a deprivation of the constitutional right of confrontation. (*Davis v. Alaska* (1974) 415 U.S. 308, 318.) However, "'[t]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."' [Citations.]" (*United States v. Owens* (1988) 484 U.S. 554, 559.)

In general, a trial court's ruling on the admissibility of evidence is reviewed under the abuse of discretion standard. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) "'[U]nless the defendant can show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility' [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.'" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1051.)

Here, it is undisputed that Hernandez made several statements that were inconsistent with his trial testimony. However, defendant has failed to show that the prohibited cross-examination would have created a significantly different view of Hernandez's credibility, that is, that he changed his statements in response to police coercion. Though the police repeatedly told Hernandez he was either a suspect or a witness, threatened to charge him as an accessory, and stressed the possibility of sexual assault in prison, the jury would also have learned that Hernandez was afraid of gang retaliation and that he was concerned about his family. Moreover, Hernandez's opinion that men did not know how to lie was supported by his statements early in the interview that he was not telling the truth. He provided a detailed account of events on February 17 and 18, but was very vague about events on the day of the murder. He later volunteered that he "didn't even know he had done it," and that "[h]e never told me he killed

nobody," thus suggesting that he had such knowledge. He also gave inconsistent statements, such as claiming that defendant did not tell him that he had a gun, and then stating that defendant "[t]ossed it" and agreeing that "it fuckin' boomed when he shot the gun." In addition, Hernandez believed that the officers' treatment of him was "cool" and they were respectful. Thus, the trial court did not abuse its discretion in limiting the cross-examination of Hernandez.

Defendant argues, however, that reversal is required under *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*). In *Crane*, the high court held that a defendant is entitled to introduce evidence regarding the circumstances of his confession even if the confession is voluntary. (*Crane*, at p. 689.) As the court explained, "the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt." (*Crane*, at p. 689.) In contrast to *Crane*, here, the issue was the circumstances surrounding statements made by a third-party witness.[9]

However, assuming that the trial court's restriction on the cross-examination of Hernandez violated the Sixth Amendment, we are convinced beyond any reasonable doubt that the assumed error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Delaware v. Van Arsdell* (1986) 475 U.S. 673, 684 [*Chapman* standard applies to restriction of cross-examination].) The evidence against defendant was overwhelming. Defendant had previously threatened to beat and kill Cardenas because he was a member of a rival gang. Luna and Rivas placed defendant at the scene when the shooting

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[9] Defendant also relies on *People v. Douglas* (1990) 50 Cal.3d 468 (*Douglas*), overruled on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4, and *People v. Badgett* (1995) 10 Cal.4th 330 (*Badgett*). However, in both *Douglas* and *Badgett*, the defendants were allowed to cross-examine the third-party witness regarding the allegedly coerced prior statements. (*Douglas*, at p. 503; *Badgett*, at pp. 351-352.) Thus, neither *Douglas* nor *Badgett* considered the issue presented in this case, that is, whether the trial court erred in restricting the cross-examination of a third-party witness.

occurred. Defendant eventually admitted being in Watsonville when the shooting occurred. Both Diaz and Alejandro Hernandez identified defendant as the individual who shot Cardenas. A photograph showed defendant with a gun matching the description of the murder weapon. After the shooting, defendant and his family asked Luna to provide him with an alibi. Defendant also repeatedly lied to the police. Thus, considering the strength of the prosecution's case and that most of Hernandez's testimony was corroborated by other witnesses, we conclude any error was harmless beyond a reasonable doubt.

B. Admissibility of Evidence of a Firearm and Ammunition

Defendant next contends that the trial court's admission of a firearm and ammunition that were not used in the murder violated his due process rights.

1. Background

Cardenas was killed by a .45 caliber handgun. Following a search, the police found a .9 millimeter semi-automatic assault pistol (Tec-9) in a storage shed behind the Resendiz family home in Watsonville. The police also found six .9 millimeter bullets in defendant's car in Redwood City. The Tec-9 is not capable of firing .45 caliber bullets and thus it was not the murder weapon. The police also found two .45 caliber Blazer brand bullets in a flower pot in one bedroom and a box containing twenty-three .45 caliber Blazer brand bullets in another bedroom in the Watsonville house. None of these bullets were the same brand as those used in the murder.

Defendant brought a motion in limine to exclude evidence of the Tec-9 handgun, the .9 millimeter bullets, and the .45 caliber bullets. He argued that this evidence was irrelevant (Evid. Code, § 350) and its probative value was outweighed by its prejudicial effect (Evid. Code, § 352).

The trial court denied the motion, and stated: "I'll admonish the jury in some way that the gun itself is irrelevant to whether or not he committed a murder, but it might be.

They can consider it. Assuming that they determine, yes, he had some connection to the situs, that it may have some probative values [sic] with regard to the gang issues in the case. [¶] The presence of the .45 mm caliber bullets, given that the murder weapon is allegedly a .45 mm caliber weapon, even though these bullets were not the same manufacturer, and given the fact that the .45 mm caliber weapon apparently wasn't recovered, may have some probative value on the murder count."

During trial, defendant objected to the admission of the Tec-9 handgun. The trial court stated: "There are cases that talk about, notwithstanding the fact that the Tec-9 is not alleged to be the murder weapon and there's a specific allegation as to the type of murder weapon in this case, that there are cases that talk about the evidence being permitted to go in front of the jury when there's allegations of other crimes. But I need to be convinced that the Tec-9 is connected to Mr. Resendiz, first of all, and then to the commission of another crime. But we will talk about that later." The trial court later stated: "So we've reviewed the Rizor [sic] case and several other cases, and Rizor [sic] states clearly that where the crime charged -- the theory of the crime charged specifies that if a particular weapon or type of weapons was used, that it's improper to allow testimony about the defendant being in possession of another type of weapon that is not the type of weapon that the prosecution is relying on being the critical weapon. [¶] And there are then subsequent cases that talk[] about the fact that the other weapon can be introduced into evidence if it supports an element of either the same crime or a different crime. So I'm a little puzzled as to what precisely is the prosecution's theory about what element of this crime or what other crime that the tech nine or the ammunition that might fit it in the tech nine would constitute evidence that will be relevant to." The prosecutor responded: "Possessing a gun, using a gun, having ammunition to use with that gun, and being prepared to use that gun is consistent with actively participating in a criminal street gang."

The trial court ruled that the evidence of the firearm was admissible, but noted that it would "limit the use of it to whatever weight the jury wants to give it with regard to the gang allegation and enhancement. And specifically instruct them about they can't use if for any propensity as to the gang allegations or as to the murder charge. [¶] The fact is, it's based mostly on the fact that he had the bullets in his car. It's being proffered as somewhat probative, given the fact it was available to him, and he had bullets that would work in it in his car [¶] . . . frankly, if your gang expert doesn't tie any use of weapons in the cogent way in his testimony, then I'll probably tell the jury to disregard after I've heard the testimony."

2. Legal Analysis

"'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "When the prosecution relies … on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98 and *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2.) However, evidence of ammunition and weapons other than the murder weapon is admissible when relevant for other purposes. (*People v. Cox* (2003) 30 Cal.4th 916, 956, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We review the trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 930.)

Here, though the .45 caliber bullets found at the Resendiz family home were not the same brand as those used in the murder, the admission of this evidence tended to show that defendant possessed a weapon matching the make of the murder weapon. Evidence of the Tec-9 and the .9 millimeter bullets was also relevant. The gang expert

testified that "weapons are commonly used by gang members. If you are in possession of a weapon or use a weapon and commit a very violent crime, again, that will bolster the individual[']s reputation. It will show that you are willing to go all the way, or commit a violent crime using that weapon for the gang." Evidence that defendant had access to another weapon and ammunition tended to show that he sought not only to promote the activities of the CHW and Norteno gangs but also to increase his status among gang members. (See former § 186.22, subd. (b)(1); § 190.2, subd. (a)(22); see also *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509 [finding that knowledge of where gang members kept guns was probative of active gang participation].) Though potentially damaging to defendant, the evidence was not highly prejudicial within the meaning of Evidence Code section 352. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. . . . 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Given that defendant was photographed with a gun matching the description of the murder weapon, the additional evidence that defendant possessed a weapon and ammunition not used in the shooting was not likely to evoke a strong emotional bias against defendant. Thus, the trial court did not abuse its discretion in admitting the evidence. Moreover, admission of the weapon and ammunition evidence for the limited purpose did not render the trial fundamentally unfair in violation of defendant's constitutional rights to due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 75.)

Defendant argues, however, that there was no evidence he possessed or even knew about the weapon. We disagree. Defendant lived with his parents at 422 Second Street in Watsonville until "about a year" before the murder. Defendant then lived in Redwood City during the week and returned every weekend to Watsonville where his parents

continued to live. Defendant's car was registered at the Watsonville address between January 12, 2006 and January 12, 2007. When the police searched the Resendiz family home in Watsonville, they found CHW gang writings in and on the residence, on a storage shed, and on a vehicle. Defendant also had gang paraphernalia at the Watsonville home. A search of defendant's vehicle in Redwood City revealed .9 millimeter bullets, thus linking him to the use of the Tec-9 weapon. Accordingly, the jury could have reasonably found that defendant knew about and had access to the gun and the ammunition.

Defendant also claims that the trial court "broke its word" when it failed to reconsider the issue of the admissibility of the firearm and ammunition evidence after the gang expert's testimony. There is no merit to this claim. The trial court stated that "if your gang expert doesn't tie any use of weapons in the [*sic*] cogent way in his testimony, then I'll probably tell the jury to disregard after I've heard that testimony." However, as previously stated, the gang expert provided a link between guns and gangs. Moreover, following the gang expert's testimony, the trial court did reconsider its ruling.[10]

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[10] Noting that section 186.22 specifies four types of weapons possession to establish the "primary activity" and "pattern of gang activity" elements of the gang enhancement statute (§ 186.22, subd. (e)(23) [minor in possession of a concealable firearm], (31) [felon in possession of a firearm], (32) [carrying a concealed firearm], and (33) [carrying a loaded firearm]), defendant next argues that his possession of the firearm was not relevant because it was not listed in section 186.22. However, evidence that defendant had access to the Tec-9 and ammunition was not admitted to prove a predicate act to establish a "pattern of gang activity" (§ 186.22, subd. (e)) or one of the gang's "primary activities" (§ 186.22, subd. (f)). Instead, it was admissible to show that defendant sought to promote gang activities and increase his status in the gang, which was relevant to the jury's findings under both former section 186.22 and section 190.2.

C. Limiting Instructions

Defendant also challenges the limiting instructions regarding the weapon and ammunition evidence. He first argues that the instructions were "so ambiguous and unclear" that he was deprived of his due process rights.

1. Background

Shortly before the firearm was introduced into evidence, the trial court advised the jury that "Mr. Resendiz is charged with murder in one count, and the prosecution has a specific theory that a particular gun was used in the murder; although, it hasn't been recovered. However, those were the references to the 1911 Colt .45 type pistol. And it being a .45 caliber pistol based on the autopsy results. [¶] You're going to hear evidence of other weapons that were found or other things related to weapons being found, . . . [¶] You're not allowed to use any of this evidence about any other weapons, whether it's bullets or another gun that you're going to hear about or a holster in determining whether you believe Mr. Resendiz is guilty of murder because the prosecution theory is that none of those weapons were used in committing the murder, nor may you consider that evidence in any way to determine whether you think that because this information -- this evidence was found in a house where he lived that he was more likely to be a violent person or had a greater propensity to commit violent acts than the other person. [¶] However, there are gang charges in this case. And you may consider this evidence along with the other evidence that you'll hear about gang activities. You're going to hear from a gang expert about things that gang members tend to do in general. It's for you to determine what kind of weight to give this other evidence. [¶] You're going to see evidence of a gun that was collected at the Resendiz home, which was not the murder weapon. You'll hear evidence you haven't heard about yet of some bullets that were found that were not the type of bullets that could have been used in the murder. [¶] And I just want to make it really clear that you cannot use any of that evidence to consider whether or not Mr. Resendiz was guilty of the murder that is charged in any way or that it

was more likely than not that he was the type of person who would engage in violent acts that might have -- tend to make you think that he's the kind of person who might commit murder. You simply can't do that. It's illegal for you to do that. [¶] But you can consider with regard to other charges in the case if you think it's evidence that's worthy of being given weight with regard to those other charges, specifically that gang enhancements and gang allegations that you'll be instructed about in the end of the case."

After the Tec-9 handgun was introduced into evidence, the trial court stated: "And I'll just repeat the admonishment I just gave you. This is not the murder weapon and is specifically the weapon I'm directing you may not consider in any way in determining Mr. Resendiz's guilt or innocence of the murder charge in this case or use it in any way to determine whether in your own mind it's more likely than not that he has a propensity for violence or anything of that nature."

2. Legal Analysis

"We must consider whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. [Citations.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 192 (*Carrington*).) We must also assume that jurors are intelligent people who are capable of understanding, correlating, and following all instructions. (*People v. Scott* (1988) 200 Cal.App.3d 1090, 1095 (*Scott*).)

Here, the limiting instructions properly restricted the jury's use of the weapon and ammunition evidence to the gang enhancements and gang allegations. The jury was also correctly informed that it could not use this evidence in its consideration of the murder charge, or as character-trait propensity or disposition evidence. The instructions further specified that the jury could use the evidence in considering the gang expert testimony "about things that gang members tend to do in general" and that the jury could determine what weight to give such evidence. Thus, we disagree with defendant that the

instructions were ambiguous and "failed to tell the jury which aspect of the gang charges could be supported by" the possession of the Tec-9 and ammunition. In our view, it was not reasonably likely that these instructions caused the jury to misapply the law. (*Carrington*, *supra*, 47 Cal.4th at p. 192.)

D. CALCRIM No. 1403

Defendant next claims that the trial court "instructed the jury under CALCRIM 1403 that it could consider the gang activity in evaluating the credibility of the witnesses; and then that it could use the credibility of the witnesses to determine whether [he] committed the homicide. Thus, CALCRIM 1403 allowed the jury to use [his] possession of the Tec-9 ultimately to prove that [he] committed the homicide," thereby violating his due process rights. He also claims that CALCRIM No. 1403 "authorized the jury to use the evidence of gang activity to prove that [he] had a motive to commit the homicide."

Here, the trial court instructed the jury at the close of evidence regarding the limited use of evidence of gang activity pursuant to CALCRIM No. 1403: "You may consider evidence of gang activity only for the limited purpose of deciding whether either the Defendant acted with the intent, purpose and knowledge that are required to prove the gang-related special circumstance or the special allegations alleged, or alternately the Defendant had a motive to commit the crime charged. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his opinion. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the Defendant is a person of bad character or that he has a disposition to commit crime."

We first note that CALCRIM No. 1403 correctly states the law regarding the limited use of gang evidence. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168.) Contrary to defendant's position, this instruction was relevant to the issues of

motive and the credibility of witnesses. Here, evidence of gang activity could properly be used by the jury to explain defendant's reason for killing Cardenas. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Evidence that certain witnesses, such as Ortega and Diaz, feared gang retaliation for testifying in court was relevant to their credibility. (*People v. Ayala* (2000) 23 Cal.4th 225, 276.) In addition to giving CALCRIM No. 1403, the trial court also specifically instructed the jury that it could not use the Tec-9 and ammunition as evidence that defendant committed the murder. We must presume that the jury understood, correlated, and followed all the instructions. (*Scott, supra,* 200 Cal.App.3d at p. 1095.) Thus, it is not reasonably likely that the jury misapplied the law. (*Carrington, supra,* 47 Cal.4th at p. 192.)

E. Sufficiency of the Evidence to Support the "Primary Activities" Element

Defendant contends that there was insufficient evidence to support the "primary activities" element of the gang findings. He argues that the gang expert's testimony lacked foundation, and that there was insufficient evidence that CHW repeatedly committed any of the statutorily enumerated crimes.

Section 190.2 , subdivision (a)(22) provides a death sentence or life imprisonment where "[t]he defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang."

Former section 186.22, subdivision (b)(1) provides an enhanced sentence for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

Former section 186.22, subdivision (f) defines a "'criminal street gang'" as "a group of three or more persons" that has as "one of its primary activities the commission of one or more of the criminal acts enumerated" in the statute. A criminal street gang

must also have "a common name or common identifying sign or symbol" and its members must "engage in or have engaged in a pattern of criminal gang activity." (Former § 186.22, subd. (f).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Proof that a "group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute" is sufficient to establish the gang's primary activity. (*Id.* at p. 324.) The occasional commission of crimes by the gang's members, however, is insufficient. (*Ibid.*) The trier of fact may consider past offenses and the charged offenses in determining whether the primary activity element is satisfied. (*Id.* at pp. 320, 323.) Expert testimony may also be used to establish that one of the group's primary activities is the commission of statutorily enumerated offenses. (*Id.* at p. 324.) However, such testimony must be based on reliable information. Thus, "[t]he testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1465 (*Duran*).)

We review the entire record to determine whether there is reasonable, credible evidence from which a trier of fact could reasonably find the gang enhancement to be true beyond a reasonable doubt. (*People v. Catlin* (2001) 26 Cal.4th 81, 139 (*Catlin*).) "We view the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028.)

Here, Officer Cortez based his testimony on a proper foundation, thereby allowing the jury to determine its reliability. At the time of trial, Officer Cortez had testified twice

as a gang expert and four or five times in gang cases. During a five-year period with the Watsonville Police Department, he had spoken to over 200 Nortenos and an equal number of Surenos in Watsonville. He had been assigned to gang units for three years and had participated in "probably 50 to 100" gang investigations. The officer, who grew up in Santa Cruz, also had "h[u]ng out" with gang members in high school and some members of his family were gang members. He based his information regarding CHW's activities on his personal observations, review of reports by his colleagues, field identification cards, and court records. Officer Cortez testified that CHW's primary activities were "something as simple as a felony vandalism, just tagging on the walls, tagging CHW to a battery, assault with a deadly weapon, carjacking, a robbery, as serious as a homicide." He also testified regarding specific details of incidents involving defendant and/or other CHW members. These incidents established that CHW members committed four serious, violent crimes during a period of three and one half years: assault with a deadly weapon on August 22, 2002, robberies on November 14, 2003 and November 22, 2003, and murder on February 19, 2006. Thus, both expert testimony and specific examples of criminal conduct constituted substantial evidence to support the jury's finding regarding the primary activities of CHW.

Defendant contends, however, that Officer Cortez's opinion lacked an adequate factual foundation. To support his claim that Officer Cortez "did not accurately understand the definition of 'primary activity,'" he refers to the officer's testimony defining a street gang as "basically any ongoing association or group of three or more people with a common name, sign or symbol who commit -- who individually or collectively engage in a pattern of criminal activity, and who commit, you know, a certain -- there's 30 crimes that they will commit, and in the commission of these 30 crimes. I don't know verbatim, but that's the best way I can explain it." Defendant asserts that the officer "admitted that he did not understand the definition of 'primary activities.'" We disagree with this interpretation.

Former section 186.22, subdivision (f) defined a "'criminal street gang'" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Though Officer Cortez conceded that he did not know the language of the statute "verbatim," he provided an adequate summary of the definition.

Defendant also claims that there was an insufficient foundation for the officer's opinion because he "incorrectly claimed that several acts constituted 'primary activities,' when, as a matter of law, several of these claimed acts could not qualify" under former section 186.22. This claim is meritless. Officer Cortez referred to five offenses that qualify as primary activities: assault with a deadly weapon; robbery; homicide; felony vandalism; and carjacking (former § 186.22, subd. (e)(1), (2), (3), (20), (21).) Since CHW's primary activities included offenses enumerated in former section 186.22, there was sufficient foundation for Officer Cortez's opinion that this element was satisfied. That the gang also engaged in non-enumerated activities did not render his opinion as lacking in foundation.

Defendant next argues that there was insufficient evidence that the five offenses to which Officer Cortez referred were committed by CHW members, and thus "there was no foundation for his opinion that most of these crimes were the gang's 'primary activity.'" Defendant argues that Officer Cortez could only rely on the charged murder to support his opinion. We disagree.

Defendant claims that the November 22, 2003 incident was a misdemeanor battery, because no weapon was involved. However, the record reflects that this incident was a robbery in which a knife was used. Officer Cortez saw Gonzalez pinning someone against a wall, and then running to a truck driven by defendant. According to the officer,

a knife was used in the robbery. Defendant next asserts that the August 22, 2002 incident was also a misdemeanor battery because defendant was "merely running, and was not near enough to [the victim] to reach him." The record establishes that defendant attacked the victim "several times" and chased him around the car with a knife. This was sufficient evidence for Officer Cortez to conclude that defendant committed an assault with a deadly weapon. Defendant also claims that Officer Cortez did not rely on the November 14, 2003 robbery as a basis for his opinion on the "primary activity" element of the gang allegations. Though the officer never testified that he based his opinion on this incident, the jury could have reasonably drawn this inference. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 139 [reviewing court must presume in support of judgment every fact reasonably inferable from the judgment].)

Defendant further asserts that there was no evidence he knew about the robbery on November 14, 2003. However, there is no requirement that a defendant be aware of specific past incidents. (See *People v. Loeun* (1997) 17 Cal.4th 1, 10.) In any event, defendant participated in some of these offenses and associated with other CHW members, thus establishing that he knew that CHW repeatedly engaged in proscribed criminal conduct.

Defendant's reliance on *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611 (*Alexander L.*) is misplaced. In *Alexander L.*, when the gang expert was asked about the gang's primary activities, he testified that "he 'kn[e]w' that the gang had been involved in certain crimes. No specifics were elicited as to the circumstances of these crimes, or where, when, or how [he] had obtained the information. He did not directly testify that criminal activities constituted" the gang's primary activities. (*Id.* at pp. 611-612.) Thus, the reviewing court held that the expert's testimony lacked foundation. (*Id.* at p. 612.) In contrast to *Alexander L.*, here, Officer Cortez testified regarding when and how he had obtained the information about CHW and he provided further information as to the circumstances of its activities.

In re Nathaniel C. (1991) 228 Cal.App.3d 990, 1003 (*Nathaniel C.*) also does not assist defendant. In *Nathaniel C.*, the court held that there was insufficient evidence to support the primary activities element. (*Id.* at pp. 1004-1005.) The court explained that "[t]he only testimony even remotely addressing this element is the expert's statement that the primary activity of all of the gangs in his area is criminal. The expert then gave a general list of the crimes he had in mind, only one of which -- assault with a deadly weapon -- is included among the eight offenses specified in the statute. The expert did not identify the Family as one of the gangs in his area. Indeed, the expert made a point of stating that the Family's base is in San Bruno rather than his jurisdiction, South San Francisco." (*Ibid.*) Unlike in *Nathaniel C.*, here, Officer Cortez testified regarding several enumerated offenses and provided examples of their commission of those offenses.

In sum, there was an adequate foundation for Officer Cortez's testimony regarding the "primary activities" element of the gang findings. There was also substantial evidence that CHW repeatedly committed statutorily enumerated crimes.

F. Pattern of Criminal Activity Element

Defendant next argues that the trial court erred in instructing the jury that the crimes of aggravated assault (§ 245, subd. (a)(1)) and possession of a firearm by a felon (§ 12021, subd. (a)(1)) could serve as predicate offenses. We agree.

In order to constitute a "'criminal street gang'" under former section 186.22, subdivision (f), the group's members must "individually or collectively engage in or have engaged in a pattern of criminal gang activity." "A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' statutorily enumerated criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' (*Id.*, subd. (e).)" (*People v. Zermeno* (1999) 21 Cal.4th 927, 930.) The two predicate offenses need not be

the same type of offense. (See *Duran, supra*, 97 Cal.App.4th at p. 1458.) "'The charged crime may serve as a predicate offense . . . .'" (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400 (*Bragg*).)

In the present case, the trial court instructed the jury that "[a] pattern of criminal gang activity as used here means any combination of two or more of the following crimes. Grand theft from the person in violation of Penal Code Section 487(c), robbery in violation of Penal Code Section 211, assault with a deadly weapon or with force likely to cause serious bodily injury in violation of Penal Code Section 245(a)(1). Possession of a firearm by a felon in violation of Penal Code Section 12021 . . . [a]nd, . . . unlawful homicide or manslaughter."

Defendant argues that there was insufficient evidence to support a finding that a CHW member committed an aggravated assault, and thus the trial court erred in including it as a possible predicate offense.

Expert witness testimony is admissible to address the definition of a criminal street gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.) While an expert may rely on hearsay in forming his or her opinion, he or she cannot prove such matters by the recitation of that hearsay information. (*Id.* at pp. 618-619.) However, Evidence Code section 452.5 "creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred." (*Duran, supra*, 97 Cal.App.4th at p. 1460.)

As previously stated, in considering a challenge to the sufficiency of the evidence, we review the entire record to determine whether there was reasonable, credible evidence from which the trier of fact could reasonably find the gang enhancement to be true beyond a reasonable doubt. (*Catlin, supra*, 26 Cal.4th at p. 139.)

Here, Officer Cortez testified that defendant attacked Gustavo Ramirez with a knife on August 22, 2002. Officer Cortez had no personal knowledge of the incident, and his testimony was based on a police report prepared by another officer. No charges were

ever filed against defendant. Since the evidence of the aggravated assault was based entirely on hearsay, there was insufficient evidence to prove that defendant committed this offense.

The cases upon which the People rely are distinguishable. In *Duran, supra*, 97 Cal.App.4th 1448, the gang expert testified that a certain individual personally admitted to him that he was a gang member. (*Duran*, at p. 1455.) A certified court minute order also documented that this individual had pleaded guilty to one of the statutorily enumerated offenses in section 186.22 within the requisite time period. (*Duran*, at p. 1456.) Thus, the reviewing court held there was substantial evidence to support the predicate offense finding. (*Duran*, at p. 1458.) The same result was reached in *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*). In that case, a certified copy of court records of a gang member's homicide conviction was introduced into evidence. (*Olguin*, at p. 1367.) The trial court also took judicial notice of an appellate opinion in which another gang member's attempted murder conviction was affirmed. (*Ibid.*) In *People v. Villegas* (2001) 92 Cal.App.4th 1217 (*Villegas*), the defendant argued that there was insufficient evidence of a predicate offense because the prosecutor failed to introduce the appropriate court records. (*Villegas*, at p. 1227.) The expert witness testified that he had personally investigated the attempted murder case and that two gang members were convicted and sentenced to prison for the offense. (*Ibid.*) The reviewing court also disagreed with the defendant, and concluded that the trial court had taken judicial notice of the case file in that case. (*Villegas*, at p. 1228.) Thus, the court held there was substantial evidence to support the predicate offense finding. (*Ibid.*) In contrast to these cases, here, Officer Cortez had no personal knowledge of the facts of the incident and the case was never prosecuted.

We next consider defendant's challenge to the trial court's inclusion of possession of a firearm by a felon as a possible predicate offense.

On September 29, 2006, Senate Bill No. 1222 amended section 186.22 to include three firearm offenses, including "possession of a firearm in violation of Section 12021," as predicate offenses. (Stats. 2006, ch. 596, § 1.) The amendment went into effect on January 1, 2007, which was after the homicide was committed.

Assuming that the amended section 186.22 operated retroactively, as asserted by the People, we will consider defendant's ex post facto claim.[11]

Both the federal and state Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) This prohibition is based on the principle that "persons have a right to fair warning of that conduct which will give rise to criminal penalties. . . ." (See *Marks v. United States* (1977) 430 U.S. 188, 191.) Thus, laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts" are unconstitutional. (*Collins v. Youngblood* (1990) 497 U.S. 37, 43; *People v. Alford* (2007) 42 Cal.4th 749, 755.) However, "[a] change in the law that merely operates to the disadvantage of the defendant or constitutes a burden is not necessarily ex post facto." (*People v. Bailey* (2002) 101 Cal.App.4th 238, 243.)

Here, defendant committed the homicide in February 2006. At that time, section 186.22 did not include possession of a firearm by a felon as a predicate offense for the purpose of defining the "pattern of gang activity" element of section 186.22. Thus, the amendment retroactively changed the definition of the gang enhancement statute, thereby implicating the prohibition against ex post facto laws. Accordingly, the trial court erred in its instructions regarding the pattern of gang activity element.

Relying on *People v. Williams* (1983) 140 Cal.App.3d 445 (*Williams*), the People argue that sentence enhancements that modify the punishment for current offenses based on prior convictions are constitutional. However, the People have mischaracterized the

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[11] We need not consider the issue of retroactivity. If amended section 186.22 was not retroactive, the trial court erred in instructing the jury that possession of a firearm by a felon was a possible predicate offense.

issue before us. In *Williams*, the defendant was found guilty of burglary and the allegations that he had suffered two prior convictions were found true. (*Williams*, at pp. 447-448.) The trial court then sentenced the defendant to three years for the burglary that occurred in 1981 and two additional years based on the prior convictions that occurred before the determinate sentencing law (DSL) went into effect in July 1977. (*Williams*, at p. 448.) The defendant committed the two prior felonies in 1972 and 1976. (*Williams*, at pp. 447-448.) In rejecting the defendant's ex post facto claim, the *Williams* court reasoned that the defendant's "previous sentences for his prior convictions were not increased by DSL; rather, his present sentence was enhanced because of his prior criminal activity." (*Williams*, at p. 449; see also *Ex parte McVickers* (1946) 29 Cal.2d 264, 271 [The habitual criminal statute is not ex post facto "as applied to convictions suffered prior to its enactment."].) Unlike in *Williams*, here, the enhancement was not based on defendant's prior convictions. Rather, the elements of the gang enhancement statute were changed and became operative after the homicide occurred. As the *Williams* court noted, "[i]f the enhancement statute in question [DSL] had taken effect [after the date the crime was committed], then the bar against ex post facto laws would have applied. [Citation.]" (*Williams*, at p. 449.) Thus, dicta in *Williams* supports our conclusion that application of the amended section 186.22 is unconstitutional in the instant case.

We now consider the issue of prejudice. When the trial court errs in its instructions to the jury regarding the elements of an offense, we must determine whether the error was harmless beyond a reasonable doubt. (*People v. Swain* (1996) 12 Cal.4th 593, 607.) Since there is no question that the jury found defendant guilty of murder beyond a reasonable doubt and this conviction could serve as a predicate offense, we focus on the second predicate offense.

Relying on *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*), the People argue that the error was harmless. In *Guiton*, the jury was instructed that it could convict the

defendant if it found that he either sold or transported cocaine. (*Guiton*, at p. 1119.) However, the instruction was erroneous, because there was insufficient evidence to support a finding that the defendant sold cocaine. (*Ibid*.) In determining whether reversal was proper, the California Supreme Court adopted the rule outlined in *Griffin v. United States* (1991) 502 U.S. 46 (*Griffin*). (*Guiton*, at p. 1121.) *Guiton* concluded that "[i]f the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground." (*Guiton*, at p. 1129.) However, as *Guiton* recognized, *Griffin* distinguished a legally inadequate theory from a factually inadequate theory on the ground that "'[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.'" (*Guiton*, at p. 1125, quoting *Griffin*, at p. 59.) However, the error in instructing on both aggravated assault and the possession of a firearm by a felon as possible predicate offenses does not involve a factually inadequate theory since there was sufficient evidence to support both offenses. Rather, this error involved legally inadequate theories. Evidence of the aggravated assault was legally insufficient because it was based on inadmissible hearsay, and possession of a firearm by a felon did not fall within the statutory definition when defendant committed the murder. Thus, the *Guiton* rule is not controlling.

People v. Chun (2009) 45 Cal.4th 1172 (*Chun*) outlines the appropriate analysis. In *Chun*, the court overruled prior case law, and held that the trial court erred in its instructions on felony murder. (*Chun*, at p. 1200.) In considering the issue of prejudice, the court reaffirmed that "a reviewing court must conclude, beyond a reasonable doubt,

that the jury based its verdict on a legally valid theory." (*Chun*, at p. 1203.) The court explained, however, that *Guiton* did not involve "the situation of a jury having been instructed with a legally adequate and a legally inadequate theory," and thus *Guiton* did "'not decide the exact standard of review' in such circumstances." (*Chun*, at p. 1203, quoting *Guiton*, *supra*, 4 Cal.4th at pp. 1130, 1131.) Since that issue was now before the court, it turned to the concurring opinion of Justice Scalia in *California v. Roy* (1996) 519 U.S. 2. In that case, Justice Scalia stated: "'The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" (*Chun*, at p. 1204.) *Chun* applied this test to the evidence before it and found that the error was harmless. As the court explained: "No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and conscious disregard for life—which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice." (*Chun*, at p. 1205.) In the present case, this court cannot conclude that the evidence, the verdict, and the instructions on which the verdict depended "leave no reasonable doubt that the jury made the findings necessary" for the second predicate offense. (*Ibid*.) In other words, there is nothing in this record to indicate that the jury relied on a legally adequate theory, that is, either the robbery or the grand theft from a person, as opposed to a legally inadequate theory, that is, aggravated assault or possession of a firearm by a felon, when it found the second predicate offense. Accordingly, the error in instructing the jury regarding aggravated assault and possession of a firearm by a felon as a possible predicate offenses was not harmless beyond a reasonable doubt.

G. Cumulative Error

Defendant contends that the cumulative impact of the errors in this case deprived him of a fair trial and due process of law.

We have concluded that there was prejudicial error in connection with the special circumstance finding and the gang enhancement findings.[12] However, since we have found no error as to the first degree murder conviction or the true findings on the weapon enhancements, we need not consider the cumulative error doctrine.

III. Disposition

The judgment is reversed and the matter is remanded for retrial of the special circumstance finding (§ 190.2, subd. (a)(22)) and the gang enhancement finding (former § 186.22, subd. (b)(1)). If the prosecutor elects not to retry the matter, the trial court shall resentence defendant.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.

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[12] Consequently, we do not reach defendant's assertions of evidentiary error, ineffective assistance, or prosecutorial misconduct